FILE COPY

FILED

DEC 28 1931

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

---

# No. 598

---

PEOPLE OF THE STATE OF MICHIGAN BY JOHN S. HAGGERTY, SECRETARY OF STATE, PETITIONER,

*vs.*

MICHIGAN TRUST COMPANY, RECEIVER OF WORDEN GROCER COMPANY, RESPONDENT.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

---

PAUL W. VOORHIES,
*Attorney General of the State of Michigan;*
EDWARD A. BILITZKE,
*Assistant Attorney General,*
*Counsel for Petitioner.*

(36,412)

# INDEX.

## Subject Index.


| | Page |
|---|---|
| Petition for a writ of certiorari | 1 |
| Summary statement of the matter involved | 1 |
| Reasons relied on for the allowance of the writ | 3 |
| Prayer for writ | 7 |
| Brief in support of petition for writ of certiorari | 9 |
| I. The opinions of the courts below | 9 |
| II. Jurisdiction | 10 |
| III. Statement of the case | 13 |
| IV. Specification of errors | 15 |
| V. Argument | 15 |
| Michigan statutes involved | 15 |
| Fundamental reasoning of Michigan supreme court | 17 |
| Fundamental reasoning of circuit court of appeals | 20 |
| Consideration of decisions of district and circuit court of appeals | 20 |
| Conclusion | 31 |
| Schedule A | 32 |


## Table of Cases Cited.


Bright et al. v. State of Arkansas, 248 Fed. Rep. 950... 4, 5, 10, 12, 22
Bright et al. v. State of Arkansas, 249 Fed. Rep. 953..... 4, 10, 23
Central Trust Co. v. New York, 250, 257; 18 N. E. 92..... 22
Conklin v. U. S. Shipbuilding Co., 148 Fed. Rep. 129..... 5, 11, 21
Coy v. Title Guaranty & Trust Co., 212 Fed. Rep. 520..... 5, 11, 21
Duryea v. American Woodworking Machine Co., 133 Fed. Rep. 329..... 5, 11, 20
Forsyth v. City of Hammond, 166 U. S. 506..... 13
In re Detroit Properties Corporation, 254 Mich. 524..... 4, 11, 14
In re G. H. Hammond Company, 246 Mich. 182..... 14, 18
In re Tyler, 149 U. S. 164..... 21
Keller v. Adams-Campbell Company, 246 U. S. 314..... 13
Layne and Bowler Corporation v. Western Well Works, 261 U. S. 387..... 13
Magnum Import Company v. Coty, 262 U. S. 159..... 13
McFarland et al. v. Hurley, 286 Fed. Rep. 365..... 4, 10, 23
Ohio v. Harris, 229 Fed. Rep. 892..... 4, 10, 22

Page

People v. Hopkins, 18 Federal Rep. 733..... 4, 10, 23, 29, 30
United States v. Whitridge, 231 U. S. 144..... 19, 20, 23, 29
Webster Electric Co. v. Splitdorf Electrical Co., 264 U. S. 463.. 13

TABLE OF STATUTES CITED.

Section 5, Chapter 2, Part V, Act 84, P. A. 1921 (Sec. 10127 of Compiled Laws of Michigan of 1929)..... 15
Section 4, Act 85, P. A. 1929 (Sec. 10140 of C. L. of 1929)..... 16, 18

TEXTBOOKS CITED.

Clark on Receivers..... 25, 26, 27
Ruling Case Law..... 20

# SUPREME COURT OF THE UNITED STATES
## OCTOBER TERM, 1931

## No. 598

PEOPLE OF THE STATE OF MICHIGAN BY JOHN S. HAGGERTY, SECRETARY OF STATE, PETITIONER,

*vs.*

MICHIGAN TRUST COMPANY, RECEIVER OF WORDEN GROCER COMPANY, RESPONDENT.

## PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Your Petitioner respectfully shows to this Honorable Court:

A.

**Summary Statement of Matters Involved.**

The Woolson Spice Company, an Ohio Corporation, on February 9, 1926, petitioned the District Court of the United States, Western District of Michigan, for the appointment of a receiver for the Worden Grocer Company, a Michigan Corporation, engaged in the wholesale grocery business (R. 2), alleging that the Worden Grocer Company was indebted to it in the sum of $3,344.14 (R. 2); that the Worden Grocer Company was then engaging in the real estate business through a subsidiary company known as the Worden Realty Company (R. 3); that because preferred stock-

holders of the Worden Grocer Company were demanding payment of their stock, and by reason of the inability of the Realty Company to retire the mortgage given at the time a bond issue was floated by the Realty Company, the petitioner, the Woolson Spice Company, feared that its account would not be paid (R. 3). It alleged that while the grocery company was solvent (R. 4) it feared the business would suffer, because of threatened suits to force the payment of other claims, and by reason of the foreclosure of said mortgage (R. 5); that the interests of the creditors and stockholders would be "best subserved if a receiver be appointed to take charge of the properties and business of the Worden Grocer Company, and with power to borrow moneys wherewith to operate the business thereof, and to protect the right of the Worden Grocer Company to occupy the real property at the City of Grand Rapids, owned by Worden Realty Company, and for such other purposes as may be necessary in order to avoid sacrifice and waste of the corporate assets" (R. 6). It prayed that the receiver "continue and manage its properties and business," etc., and "that after the corporate debts are paid or secured to the satisfaction of this (District) court, the assets of said grocery company be restored to it" (R. 7). By resolution the grocery company consented to the appointment of a receiver (R. 9). The order appointing the receiver, made February 9, 1926, authorized the receiver "to carry on the business now carried on by Worden Grocer Company" (R. 11).

Thereafter, on February 28, 1930, the petitioner herein, in behalf of the People of the State of Michigan,

petitioned said District Court (R. 12) for an order compelling the receiver to file annual reports with him as Secretary of State, and to pay to him, as Secretary of State, the corporation privilege tax for the years 1926, 1927, 1928, and 1929, stipulated by counsel to amount to $10,988.26 (R. 22 and 24). Said privilege tax being imposed by Acts 84 and 85 of the Public Acts of 1921 (R. 13).

On August 1, 1930, the District Court, through Judge Raymond, granted the prayer of said petition and ordered the payment of said privilege tax (R. 19). It appears from the order of this Court that the assets of the grocery company were sold on December 30, 1929 (R. 20); that the receiver has paid a 25 per cent dividend to the common creditors (R. 20). No part of said tax has been paid.

On appeal to the Circuit Court of Appeals for the Sixth Circuit, the judgment of the lower court was, on October 8, 1931, reversed, the court holding that the assets in the hands of the receiver should not be chargeable with this tax; that "should it appear that a surplus over indebtedness was payable by the receiver to stockholders, for and on account of their stock holdings, such fund would be chargeable with the claim of the State for franchise taxes" (R. 39).

B.

**Reasons Relied on for the Allowance of the Writ.**

I.

The decision of the said Circuit Court of Appeals as to the liability of the receiver for the payment of the

corporate privilege tax, maturing during the period of the receivership and before the dissolution of the corporation, is in conflict with the following decisions of the Circuit Courts of Appeals:

*People* v. *Hopkins*, 18 Federal Reporter, 2nd Series, 733;

*Bright et al.* v. *State of Arkansas*, 249 Fed. Rep. 950;

*Bright et al.* v. *State of Arkansas*, 249 Fed. Rep. 953;

*McFarland et al.* v. *Hurley et al.*, 286 Fed. Rep. 365;

*Ohio* v. *Harris*, 229 Fed. Rep. 892.

II.

That the decision of the Circuit Court of Appeals in the instant case is a decision of an important question of local law, involving the right to collect taxes imposed under the laws of the State of Michigan, and said decision is in conflict with an applicable local decision of the Supreme Court of the State of Michigan. That the Supreme Court of Michigan, on June 1, 1931, in the case *In Re Detroit Properties Corporation*, 254 Mich. 524, where the facts showed that the receiver had been appointed to "continue the business of the corporation" held that the corporation privilege tax must be paid by the receiver. The issue and facts in the case before the Circuit Court of Appeals, sought to be reviewed in this court, are identical with the issue and facts in the case before the Supreme Court of Michigan. (Full text of opinion of Michigan Supreme

Court attached to Brief accompanying this petition, and marked "Schedule A".) (Page 32.)

III.

The decision of the Circuit Court of Appeals in the instant case is in direct conflict with the weight of authority. That this exact question has been before District Courts of the United States who have held without exception that such tax was payable where the receiver carried on the business of the corporation. The following are citations of the opinions of District Courts:

*Conklin* v. *United States Shipbuilding Co.*, 148 Fed. Rep. 129;

*Duryea* v. *American Woodworking Machine Co.*, 133 Fed. Rep. 329;

*Coy* v. *Title Guarantee & Trust Co.*, 212 Fed. Rep. 520.

The Circuit Court of Appeals in its decision in the instant case, admits the conflict of authority, by calling attention to the cases decided by the other Circuit Courts of Appeals, but dismisses them with the statement that they were not sound in reason and for that reason felt they were under no obligation to follow them (R. 37). The District Court of the United States, in its decision in the instant case (R. 16) calls attention that the weight of authority sustains the payment of the tax under the facts in this case. For discussion as to the weight of authority, see *Bright* v. *State of Arkansas*, 249 Federal Reporter 950.

2j

IV.

That by reason of the conflict between the decision of the Circuit Court of Appeals in the instant case, and the Michigan Supreme Court, and the decision of other Circuit Courts of Appeals, a state of confusion prevails in the administration of the law imposing a privilege tax on corporations in the State of Michigan. That the Circuit Court of Appeals has decided an important question of local law in conflict with an applicable local decision. That by reason of the conflict of decisions, a receiver appointed by a Federal Court in Michigan, could not be required to pay the corporate privilege tax, whereas a receiver appointed by a State Court in Michigan, would be required to pay the corporate privilege tax.

V.

That the liability of a receiver, appointed by the District Court of the United States, to pay a corporation privilege tax imposed by the laws of the State of Michigan, said tax maturing during the period of the receivership and prior to the dissolution of the corporation, has never been determined by this Court; that it is an important question of Federal law, and of local law, and directly involves the collection of a substantial amount of state taxes and should be settled by the decision of this Court.

VI.

That the judgment of the Circuit Court of Appeals in the instant case, should be reversed, and the judgment of the District Court of the United States be affirmed.

WHEREFORE your Petitioner prays that a Writ of Certiorari be issued out of and under the Seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify to and send to this Court, for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and of the proceedings in the case, numbered and entitled on its Docket, No. 5745, Michigan Trust Company, Receiver of Worden Grocer Company, Appellant, vs. People of the State of Michigan, by John S. Haggerty, Secretary of State, Appellee, and that said judgment of the Circuit Court of Appeals may be reversed by this Honorable Court, and the judgment of the District Court of the Western District of Michigan be affirmed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioner will ever pray.

PEOPLE OF THE STATE OF MICHIGAN,
By JOHN S. HAGGERTY,
*Secretary of State,*
By PAUL W. VOORHIES,
*Attorney General.*

PAUL W. VOORHIES,
*Attorney General for the State of Michigan,*
EDWARD A. BILITZKE,
*Assistant Attorney General,*
*Attorneys for Petitioner.*

Business address: The Capitol, Lansing, Michigan.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

---

# No. 598

---

PEOPLE OF THE STATE OF MICHIGAN BY JOHN S. HAGGERTY, SECRETARY OF STATE, PETITIONER,

*vs.*

MICHIGAN TRUST COMPANY, RECEIVER OF WORDEN GROCER COMPANY, RESPONDENT.

---

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

---

I.

### The Opinions of the Court Below.

The opinion of the District Court of the United States, Western District of Michigan, is shown on page 16 of the record.

The opinion of the Circuit Court of Appeals for the Sixth Circuit is reported in 52 Federal Reporter 842. (See also R. 34.)

## II.

### Jurisdiction.

(1) Application for Writ of Certiorari to review the judgment of the Circuit Court of Appeals is made pursuant to Section 240 of the Judicial Code as amended by Act of February 13, 1925. 27 U. S. Code Ann., Sec. 347.

For reasons relied upon for allowance of Writ, see page 3 of the Petition for Writ of Certiorari.

(2) The date of the judgment to be reversed is October 8, 1931 (R. 33).

(3) The decision of the said Circuit Court of Appeals as to the liability of the receiver for the payment of the corporate privilege tax, maturing during the period of the receivership and before the dissolution of the corporation, is in conflict with the following decisions of the Circuit Court of Appeals:

*People* v. *Hopkins,* 18 Federal Reporter, 2nd Series, 733;

*Bright et al.* v. *State of Arkansas,* 249 Fed. Rep. 950;

*Bright et al.* v. *State of Arkansas,* 249 Fed. Rep. 953;

*McFarland et al.* v. *Hurley et al.,* 286 Fed. Rep. 365;

*Ohio* v. *Harris,* 229 Fed. Rep. 892.

(4) That the decision of the Circuit Court of Appeals in the instant case, is a decision of an important question of local law, involving the right to collect

taxes imposed under the laws of the State of Michigan, and said decision is in conflict with an applicable local decision of the Supreme Court of Michigan. That the Supreme Court of Michigan on June 1, 1931, in the case *In re: Detroit Properties Corporation*, 254 Mich. 524, where the facts showed that the receiver had been appointed to "continue the business of the corporation" held that the corporation privilege tax must be paid by the receiver. The issue and facts in the case before the Circuit Court of Appeals, sought to be reviewed in this Court, are identical with the issue and facts in the case before the Supreme Court of Michigan. (Full text of opinion of Michigan Supreme Court attached hereto, and marked "Schedule A") (page 32).

(5) The decision of the Circuit Court of Appeals in the instant case is in direct conflict with the weight of authority. That this exact question has been before District Courts of the United States who have held without exception that such tax was payable where the receiver carried on the business of the corporation. The following are citations of the opinions of District Courts:

*Conklin* v. *United States Shipbuilding Co.*, 148 Fed. Rep. 129;

*Duryea* v. *American Woodworking Machine Co.*, 133 Fed. Rep. 329;

*Coy* v. *Title Guarantee & Trust Co.*, 212 Fed. Rep. 520.

(6) The Circuit Court of Appeals in its decision in the instant case, admits the conflict of authority, by

calling attention to the cases decided by the other Circuit Courts of Appeals, but dismisses them with the statement that they were not sound in reason and for that reason felt they were under no obligation to follow them (R. 37). The District Court of the United States, in its decision in the instant case (R. 16) calls attention to the weight of authority and sustains the payment of the tax under the facts in this case. For discussion as to the weight of authority, see *Bright* v. *State of Arkansas*, 249 Federal Reporter, 950.

(7) That by reason of the conflict between the decision of the Circuit Court of Appeals in the instant case, and the Michigan Supreme Court, and the decision of other Circuit Courts of Appeals, a state of confusion prevails in the administration of the law imposing a privilege tax on corporations in the State of Michigan. That the Circuit Court of Appeals has decided an important question of local law in conflict with an applicable local decision. That by reason of the conflict of decisions, a receiver appointed by a Federal Court in Michigan, could not be required to pay the corporate privilege tax, whereas a receiver appointed by a State Court in Michigan, would be required to pay the corporate privilege tax.

(8) That the liability of a receiver, appointed by the District Court of the United States, to pay a corporation privilege tax imposed by the laws of the State of Michigan, said tax maturing during the period of the receivership and prior to the dissolution of the corporation, has never been determined by this Court; that it is an important question of Federal law, and

of local law, and directly involves the collection of a substantial amount of State taxes and should be settled by the decision of this Court.

The following cases sustain the jurisdiction of this Court to grant a Writ of Certiorari in the instant case:

*Keller* v. *Adams-Campbell Co.*, 264 U. S. 314, 68 L. Ed. 705, 44 Sup. Ct. 356;

*Magnum Import Co.* v. *Coty*, 262 U. S. 159, 67 L. Ed. 922, 43 Sup. Ct. 531;

*Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 67 L. Ed. 712, 43 Sup. Ct. 422;

*Forsyth* v. *City of Hammond*, 166 U. S. 506, 41 L. Ed. 1095, 17 Sup. Ct. 665, rev'g decree, 71 Fed. 443;

*Webster Elec. Co.* v. *Splitdorf Electrical Co.*, 264 U. S. 463, 68 L. Ed. 792, 44 Sup. Ct.

## III.

### Statement of the Case.

Full detailed statement of the case has been given under subdivision "A" in the petition for Writ of Certiorari (page 1 of Petition), and is therefore omitted from this brief. However, the question for determination is the correctness of the opinion of the Circuit Court of Appeals holding that a receiver, appointed to carry on the business of a solvent corporation, by and with the consent of the directors of the corporation, should not be chargeable with the corporation privilege tax imposed by the State of Michigan, the said tax maturing during the period of the

receivership. The Circuit Court of Appeals holding that any surplus in the hands of the receiver, after other creditors and the expenses incurred by the receiver have been paid, should be chargeable with the claim of the State for such franchise taxes (R. 39).

It is the contention of the Petitioner that this decision of the Circuit Court of Appeals announces a new rule of law regarding the payment of taxes by a receiver, without precedent either in the way of court decisions or treatise, and is contrary to the weight of authority. That inasmuch as that court has held that such tax is payable out of any funds available for the stockholders, it thereby establishes the rule that the corporate existence is continued, and because the corporate existence is continued, under the decisions of the Supreme Court of Michigan, the corporate privilege tax is payable.

Not only is the decision of the Circuit Court of Appeals in direct conflict with the decision of the Michigan Supreme Court (*In re Detroit Properties Corp.*, 254 Mich. 525), but the decision is contrary to the decision of other Circuit Courts of Appeals and other District Courts heretofore cited.

That the corporate privilege tax in Michigan has been held to be payable by a corporation organized under the laws of Michigan, regardless of whether the corporation does any business within the State. See *In Re G. H. Hammond Company*, 246 Mich. 182. It is the contention of the Petitioner that because the receiver was appointed to carry on the business of a corporation that was not insolvent and whose term of existence had not been terminated, that the court should

order the payment of this tax the same as it ordered the payment of taxes upon real estate, personal property, etc.

## IV.

### Specifications of Errors.

1. That the Circuit Court of Appeals erred in holding that the judgment of the District Court should be reversed.

2. That the court erred in holding that the corporate privilege tax, which accrued after the receiver was appointed, was not an obligation which the receiver should be required to pay.

3. That the court erred in holding that said privilege tax is payable only when it appears that a surplus over indebtedness was payable by the receiver to stockholders, on the theory that the corporate existence can only be regarded as continued for the benefit of the stockholders.

## V.

## ARGUMENT.

### Michigan Statutes Involved.

The privilege fees here claimed are imposed by the State of Michigan pursuant to the provisions of Section 5, Chapter 2, Part V, Act 84, P. A. 1921 (Sec. 10127 of Compiled Laws of 1929), the relevant portion of which reads as follows:

> "'Every corporation organized for pecuniary profit, * * * shall annually, in the month of

July or August, file a report in duplicate with the secretary of state showing its condition at the close of business upon the thirty-first day of December, or upon the date of the close of its fiscal year, next preceding, on suitable blanks to be furnished by the secretary of state as hereinafter provided; * * * Such report shall furnish the secretary of state with all information and facts necessary for the computation of the annual franchise fee provided by law. The secretary of state is hereby authorized to require of any corporation any additional information that may be needed after the filing of its annual report for the purpose of computing such fee. * * * Such reports shall be * * * deposited in the office of the secretary of state within the said month of July or August accompanied by a filing fee of two dollars, and the amount of the annual franchise fee provided by law: * * *"

(This section amended in respects not relevant to these issues, by Act No. 72, Public Acts of 1927), and pursuant to Section 4 of Act No. 85, Public Acts of 1921 (Sec. 10140 of Compiled Laws of 1929) which, as originally enacted, read as follows:

"Every corporation organized or doing business under the laws of this state, excepting those hereinafter expressly exempted therefrom, shall, at the time of filing its annual report with the secretary of state of this state, as required by section seven hereof, *for the privilege of exercising its franchise and of transacting its business within this state*, pay to the secretary of state, an annual fee of three and one-half mills upon each dollar of its paid-up

capital and surplus, but such privilege fee shall in no case be less than fifty dollars nor more than ten thousand dollars."

This section was amended by Act No. 233, Public Acts of 1923, among other things to reduce the amount of the privilege fee from three and one-half mills upon each dollar to two and one-half mills. The same was again amended by Act No. 175, Public Acts of 1929, with the following statement added:

> "It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, having the privilege of exercising corporate franchises within this state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period."

**Fundamental Reasoning of the Supreme Court of Michigan in re: Detroit Properties Corporation, 254 Mich. 525.**

The issue before the Supreme Court of Michigan was identical with the issue before the Circuit Court of Appeals in the instant case. The Supreme Court of Michigan states the issue as follows:

> "The issue is whether the corporation is subject to the privilege fee which, by 2 Comp. Laws 1929, Sec. 10140, every domestic corporation is required to pay 'for the privilege of exercising its franchise and of transacting its business within this State', and which accrued after the appointment of the receiver and its taking control of the corporate property and business. * * *"

The Court found:

1. That the privilege tax imposed by the Statutes of Michigan is required to be paid—

> "For the privilege of exercising its franchise and of transacting its business in Michigan."

That actual transaction of business by a corporation is not a condition of the tax. It will be noted that the Statutes imposing such tax (Sec. 10140 of the Comp. Laws of Mich. 1929) reads:

> "* * * It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, having the privilege of exercising corporate franchises within this State, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period."

The part of the statute just quoted was added to the Corporate Privilege Tax Law by an amendment in 1929, which became effective May 20, 1929. The privilege taxes herein sought are for the years 1926, 1927, 1928 and 1929. The Supreme Court of Michigan had, previous to said amendment, construed the Corporate Privilege Tax Law as originally enacted so as to require the payment of said tax in any case where a corporation was "organized" under the laws of Michigan; and for that reason the amendment in 1929 did not change the law as it was then being administered in Michigan.

The Supreme Court of Michigan *In re G. H. Hammond Company*, 246 Mich. 182, said—

"* * * It is apparent from the context of the statute itself that this provision was intended to apply to every corporation *organized* under the laws of this State. * * *"

"Michigan has seen fit to adopt legislation by which the annual privilege fee is imposed upon a corporation organized under its laws regardless of whether the corporation does any business within the State. * * *"

2. That in all cases cited or found, where the power to impose a similar tax during receivership has been denied, it appeared that the corporation was insolvent or in process of liquidation, or had been prohibited by law or injunction from exercising its franchise, or the proceedings were for dissolution; the receiver was not operating the business, and the life or right of the corporation to do business has ceased.

3. That the courts are unanimous in holding a receiver liable for the franchise or privilege tax where he operates the business of the corporation.

4. That courts in enforcing the payment of a corporate privilege tax have not distinguished between a public utility and a private corporation.

5. The Michigan Supreme Court finds the case of *United States* v. *Whitridge*, 231 U. S. 144, not controlling of the question before the court.

6. That during receivership, a corporation is not divested of its franchise, nor do they lapse. The court merely takes them into its custody for a time. The franchise "to do" passes to the control of the court.

7. That during receivership the court becomes the custodian of the corporate franchise.

8. That the tax is on the franchise, and, as the franchise is being exercised by the receiver, the tax is valid.

**Fundamental Reasoning of the Circuit Court of Appeals in the Instant Case.**

(1) The Circuit Court of Appeals does not accept the reasoning of the Michigan Supreme Court that the receiver of a private corporation may only conduct such business as the corporation theretofore organized by charter may transact, claiming that the receiver may, under the direction of the court, do any act which might be performed by any citizen in total disregard of the corporate capacity, and without any reliance whatever upon its franchise. The court does agree that the rule would be otherwise in the case of the receiver of a public utility corporation, indicating that the receiver of a public utility corporation should pay the corporate privilege tax.

(2) That the receiver is not exercising the franchise of the corporation, and that the corporation, during the receivership, has been ousted of its privilege to do business in corporate form.

(3) In the court's opinion the case of *United States* v. *Whitridge*, 231 U. S. 144, is controlling.

**Consideration of Decisions in District and Circuit Courts of Appeal.**

In *Duryea* v. *American Woodworking Machine Co.*, 133 Fed. Rep. 329, decided by the District Court of

New Jersey in 1904, the court held that a yearly license fee or tax on corporations, which accrued after the receiver was appointed, should be paid by the receiver. City *Davis* v. *Gray*, 16 Wall. 203, 221 (21 L. Ed.) 447, where the court said—

> "A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the Constitution gives him a choice of tribunals."

In *Conklin* v. *United States Shipbuilding Company*, 148 Fed. 129, decided by the New Jersey District Court in 1906, the court held that—

> "The annual franchise tax imposed on corporations by the New Jersey Statute, which provided that such tax shall be a preferred debt in case of insolvency, is a valid preferred charge against the assets of an insolvent corporation being administered by a receiver of a court of equity within the State, whether State or Federal, so long as the corporation remains undissolved. * * *"

*Coy* v. *Title Guaranty & Trust Co.* (D. C.), 212 Fed. 520, decided in 1914, holds the receiver liable for taxes assessed against personal property while in the hands of a receiver. The court quoted with approval the language of Mr. Chief Justice Fuller, *In re Tyler*, 149 U. S. 164, 182, 13 Sup. Ct. 785, 790 (37 L. Ed. 689)—

> "Undoubtedly property so situated (in custodia legis) is not thereby rendered exempt from the imposition of taxes by the government

> within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law, * * *"

In the *State of Ohio* v. *Harris*, 229 Fed. Rep. 898, decided by the Circuit Court of Appeals in 1916, the State of Ohio intervened in a receivership case by petition for payment by the receiver of franchise fees exacted by an Ohio statute. The court construed the Ohio law as being a tax upon the actual doing of business, rather than upon the mere privilege of doing; as is the case under the Michigan law. Finding, as a matter of fact, that the receiver had not conducted the business, the petition of the State was denied; but not until the court had added the following significant statement—

> "When we thus treat the interventions alike for purposes of the tax in dispute, we appreciate the fact that we could not do so if the receiver had during the tax years in question conducted the corporation business in the regular way; for he then would have been chargeable with having exercised the franchise. Central Trust Company *v.* New York, 250, 257, 18 N. E. 92, 1 L. R. A. 260, opinion by Judge (later Mr. Justice) Peckham."

*Bright et al.* v. *State of Arkansas*, 249 Fed. 950, decided in 1918 by the Circuit Court of Appeals, 8th Circuit, the court held that the receiver of a railroad company should pay an annual privilege tax under a statute which exacted the tax, for the privilege of exercising its franchise. The court calls attention to the de-

cision of the Supreme Court of the United States in *United States* v. *Whitridge, supra,* and states that the question of the payment of such taxes by a receiver has long been a subject of debate and of conflicting decisions. The court cites decisions from the Circuit Courts of Appeals, and concludes by saying—

> "* * * by the great weight of modern authority, that courts of equity, operating the property and liquidating the debts of corporations which would otherwise have been liable to pay such taxes, ought to direct the payment by their receivers of such taxes as would have accrued during the time the receivers were actually operating the property."

See also the companion case of *Bright et al.* v. *State of Arkansas,* 249 Fed. 953, which holds in favor of the payment of the tax.

In *McFarland* v. *Harley,* 286 Fed. 365, decided in 1923, the Circuit Court of Appeals held the receiver liable for a severance tax accruing after the receiver was appointed. The court held the tax payable, saying—

> "They (the receivers) are custodians of the property for the benefit of the litigants, and the property in their hands should bear whatever tax burdens it would be subject to in the hands of the owners or litigants."

In *People* v. *Hopkins,* 18 Fed. (2nd) 731, decided in 1927, the Circuit Court of Appeals held that the receiver's custody of property of an insolvent estate, held not to give it immunity from liability for franchise taxes under the tax law of New York, Sections 209, 214;

franchise taxes being construed as a tax on the privilege of continued existence as a corporation. The Circuit Court of Appeals then had before it the decision of this Court in the Whitridge case, which is relied upon by the Circuit Court of Appeals in the instant case. The court evidently felt that the Whitridge case was not controlling of the question then before the court, which involved the payment of a corporate privilege tax.

**United States v. Whitridge Not Controlling.**

We believe that the Whitridge case can be distinguished in reason from the case at bar. The Supreme Court therein stated that the corporation income tax law, there under consideration, was "imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business, and with respect to the carrying on thereof." The court said the tax was not payable "unless it (the corporate business) be carried on by the corporation," concluding by saying that the corporation income tax law "did not impose a tax upon the income derived from the management of corporate property by receivers under such conditions as are here presented."

The Federal corporation income tax law is fundamentally different from the corporate privilege tax law of Michigan. The tax in Michigan is payable by all corporations ORGANIZED OR DOING BUSINESS in the State. The Whitridge decision clearly states that it is necessary for the corporation to do business before the income tax is payable.

**Franchise and Corporate Powers Continue After Receiver is Appointed.**

As heretofore stated, the bill of complaint filed in the instant case for the appointment of a receiver did not seek to terminate the corporation. The bill of complaint prayed that "the receiver 'continue and manage its properties and business', etc., and 'that after the corporate debts are paid or secured to the satisfaction of the court, the assets of said grocery company be restored to it'" (R. 7). The officers of the corporation were only enjoined by the order appointing the receiver, from "receiving any debts due to said defendant, or from praying or transferring any of its effects of any kind, or from interfering with said receiver or its operation and conduct of the business" (R. 11).

The general rule regarding the effect upon the corporation of the appointment of a receiver is stated by Clark on Receiver, section 707, as follows:

> "As regards a general equity or *pendente lite* receiver appointed by the federal courts or appointed by a state court not under a statute, the legal existence of a corporation is not cut short by the appointment of such a receiver. The existence of the corporation is not suspended. It is still the corporate entity that it was before. It is clothed with the same franchises and its corporate powers continue to exist subject in their exercise of course to limitations arising out of the changed conditions and situations. Citing Standard Roller Bearing Co. *v.* Hess Bright Mfg. Co. (1921), 275 Fed. 916, 920; affirming Standard Roller Bearing Co. *v.* Hess

Bright Mfg. Co. (1920), 264 Fed. 516; Chemical Nat'l Bank *v.* Hartford Deposit Co. (1895), 161 U. S. 1, 40 L. Ed. 595, 16 Sup. Ct. 439; Du-Pont *v.* Standard Arms Co. (1912), 9 Del., Ch. 315, 320, 81 Atl. 1089. Under such circumstances the corporation may generally do all things necessary to preserve its legal existence notwithstanding the appointment of the receiver to which the temporary management of the corporation's property is given—otherwise the appointment of the receiver would be tantamount to a dissolution of the corporation."

**Effect of Appointment of Receiver on Powers of Directors.**

The same author states the rule in section 708 as follows:

"The directors of a corporation are given power to act by the legislature creating the corporation. The ordinary equitable appointment of a receiver for the preservation of the assets of a company, pending a suit concerning these assets, does not necessarily destroy the corporation nor deprive the directors of their power to act as directors except as it does prevent the directors from interfering with the receiver's control of the property committed to him. It has been held by the Federal Court that the appointment of a receiver by the State Court of Georgia, since it does not destroy the corporation or deprive the directors of their power, does not deprive the directors of the right to pass a resolution authorizing the bankruptcy of a corporation and to file the same." *In re* Beaver Mills Co. (1921) 275 Fed. 498.

**Effect of Appointment of Receiver on Franchises of Corporation.**

The same author states the rule in section 709, as follows:

> "The appointment of a receiver *pendente lite* or what is sometimes called an equity receiver of a corporation does not directly affect the charter of the corporation. No court of chancery or other court has inherent power to destroy or take away the charter of a corporation, granted to such corporation by the legislature of the State creating the court or take away a charter created by any other State. Courts can only dissolve or annihilate a corporation, when a statute provides for the continuation of such as may be necessary to close up the business."
>
> "However, frequently receivers are appointed *pendente lite* or otherwise of corporations, which corporations not only possess a charter authorizing them to be corporations, but such corporations frequently possess what are known as franchises or powers granted such corporations by the State or city to operate a railroad, street railway, public utility or perform some other function. The appointment of a *pendente lite* or equity receiver does not of itself abrogate or destroy such a franchise. The object of a receivership when the receiver is ordered to run a business or operate a railway or other public utility is generally to enable the company through its receiver to continue and exercise the franchises and functions granted to the corporation by the State and to avert the suspension of all operation undue such franchises.

> • • • A court operating such property may operate the same through its receiver within the limits and rights laid down by the franchises authorizing such railroad or other public utility to so operate."

From the foregoing it appears that the franchise of the corporation did not vanish with the appointment of a receiver to "continue the business of the Worden Grocer Company" (R. 11). That the stockholders and directors of said corporation remained in possession of their rights as such, with the exception of the right to manage the property, and that the receiver succeeded to the right of management; in accordance with the charter of said corporation. Surely no court would hold that a receiver of a railroad company could operate a business entirely outside of the corporate powers of said company. The court in fixing the powers of the receiver will give effect to the powers of the corporation whose business he is "carrying on." Inasmuch as all assets are turned over to the receiver, who is thereby enabled to continue the business of said corporation for the benefit of creditors and stockholders, it is only reasonable that the State who has granted said charter should be paid a fee from the funds in the hands of the receiver. Can a solvent corporation go into the hands of a receiver and thereby carry on the business of said corporation, enjoying the franchise vested in it by the State and which is continued and acted upon by them, and thereby escape the payment of a fee, exacted by the State as a condition to corporate existence? We do not believe a court will permit this avenue of escape.

This Court is familiar with the rule it has adopted and followed consistently, as aptly stated in 27 Ruling Case Law, page 44, that:

> "In the construction of local statutes the decision of a state court of last resort will govern the Federal Courts; although the same act may have received a different construction in other states."

This rule has been followed in giving effect to decisions in state courts involving taxation.

We appreciate that the Circuit Court of Appeals in the instant case has assigned as a reason why it did not follow the decision of the court of last resort of this state on the question here under consideration, stating that "No question of the construction of a State statute by the highest court of the State was there or is here involved" (R. 34). We cannot justify this conclusion. The tax in question is purely statutory. Whether or not the tax is payable by a receiver depends upon the nature of the tax, which can only be determined by a construction of the particular statute. The Circuit Court of Appeals does in its opinion construe the statute imposing this tax. We submit that it did, by passing upon the question in issue, pass upon the construction of said statute. In determining whether or not a receiver of a corporation should pay a corporate income tax this court in *United States* v. *Whitridge, supra,* was required to construe the statute imposing said tax. The Circuit Court of Appeals in *People* v. *Hopkins; supra,* in determining the liability of a receiver for a corporate privilege tax, construed the statute imposing said tax. As heretofore stated,

our Supreme Court has held that this fee is to be paid by any corporation organized or doing business in Michigan. It being true that the corporate existence was not terminated; that the business was continued and that the receiver for the mutual benefit of the stockholders and creditors who urged his appointment, has profited by the continuation of such business and enjoyed the franchise granted by the state, then under the decision of the highest court of Michigan, this tax is payable. Certainly only confusion can result from direct conflict between the decisions of our Supreme Court and the Circuit Court of Appeals.

In conclusion we wish to quote from the language of the Circuit Court of Appeals, Second Circuit, taken from *People* v. *Hopkins*, 18 Fed. (2nd) 733:

> "With respect to property taxes, it is perfectly obvious that the custody of the receiver should not give the property immunity from taxation. The Supreme Court has stated, with reference to bankruptcy that there is nothing in the dedication of property to the payment of creditors which withdraws it from the necessity of protection by the state and municipality, or exempts it from its obligation to either. Swarts *v.* Hammer, 194 U. S. 441. This reasoning is equally apposite to a chancery receivership, and there is no lack of authority on the point. Coy *v.* Title Guarantee & Trust Co., 220 Fed. 90. With respect to franchise taxes, the result should be the same, and is, when the statute is construed as a tax upon the privilege of continued existence as a corporation. New Jersey *v.* Anderson, 203 U. S. 483. When the statute is construed as a tax upon the privilege of exer-

cising the corporate franchise—that is, of continued operation of the corporate business—franchise taxes subsequent to the receivership are usually upheld if in fact the receivership has continued the business."

The order appointing the receiver provides for the payment of: "all taxes and assessments levied upon the property and assets of said company."

We submit that by reason of this order and the weight of authority this privilege tax should be ordered paid by the receiver out of the funds in his possession, which have resulted by reason of the continuation of the business and franchise of said corporation.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, in order that the conflicting decisions of the Circuit Courts of Appeals and the Michigan Supreme Court may be reviewed and a final rule of law announced and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals and finally reverse it.

PAUL W. VOORHIES,
*Attorney General of the State of Michigan,*
EDWARD A. BILITZKE,
*Assistant Attorney General,*
*Counsel for Petitioner.*

## SCHEDULE "A".

### In re Detroit Properties Corp.

1. Licenses—Corporations—Privilege Fee—Excise Tax on Franchise "to do".

Corporation privilege fee is excise tax, not on right to be corporation, but on activities of corporation in exercise of its corporate franchise, or on franchise "to do", not on franchise "to be" (2 Comp. Laws 1929, Sec. 10140).

2. Same—Tax is imposed on Right To Transact, Not on Actual Transaction.

Actual transaction of business by domestic corporation is not condition of privilege tax, but it is imposed on right to transact business (2 Comp. Laws 1929, Sec. 10140).

3. Corporations—Receivers—Licenses—When Receiver Liable For Franchise Tax.

Receiver of corporation is liable for franchise or privilege tax where he operates the business of the corporation under order of court, since he is exercising the franchise "to do", and whether it be private corporation or public utility is immaterial.

4. Same—On Receivership Franchises Pass to Control of Court.

On receivership, corporation is not divested of its franchises, nor do they lapse, but court merely takes them into its custody for a time; the franchise "to do" passing into control of court.

5. Same—Receiver is Officer of Court.

Receiver of corporation is creature or officer of court, and is not agent of corporation.

6. Same—Receiver Takes Place of Corporation and Officers.

Receiver of corporation conducting its business takes place of corporation and its officers for purpose of

performing necessary corporate duties and functions, and has same powers for such purposes, but he cannot act in excess of corporate powers, and court cannot invest him with authority to that extent.

Certiorari to Corporation Tax Appeal Board. Submitted April 7, 1931. (Docket No. 9, Calendar No. 35,451.) Decided June 1, 1931.

Union Guardian Trust Company, receiver of the Detroit Properties Corporation, a Michigan corporation, was ordered to pay an annual privilege fee by the Secretary of State. Receiver appealed to Corporation Tax Appeal Board, where the order of the Secretary of State was affirmed. Receiver reviews affirmance of the order by certiorari. Affirmed.

Beaumont, Smith & Harris (M. S. Harlan and Richard W. Larwin, of counsel), for plaintiff.

Paul W. Voorhies, Attorney General, and Charles Rubiner, Assistant Attorney General (Alice E. Alexander, of counsel), for defendant.

FEAD, J.:

This is certiorari to the corporation tax appeal board to review affirmance of a levy of corporation privilege tax by the secretary of State.

The Detroit Properties Corporation was incorporated under the laws of this State to buy and hold real estate, stocks, bonds, or other securities and to deal in the same. A bill of complaint was filed against it by a creditor, alleging, in substance, that the corporation was solvent but confronted with immediate financial embarrassment and praying, among other things, for the appointment of a receiver, with authority to continue the business of the defendant and "to protect and preserve its franchise and privileges." The court appointed Union Guardian Trust Company

temporary receiver with the usual powers and also authority—

> "in general to operate the business of the defendant as fully as the defendant operated same and in the manner best calculated in the opinion of the receiver to fully protect that business, to the end that the business of the defendant may be preserved as well as its assets."

The issue is whether the corporation is subject to the privilege fee which, by 2 Comp. Laws 1929, Sec. 10140, every domestic corporation is required to pay "for the privilege of exercising its franchise and of transacting its business within this State," and which accrued after the appointment of the receiver and its taking control of the corporate property and business. The question is one of first impression with this Court.

The privilege fee is an excise tax, not upon the right to be a corporation, but upon the activities of the corporation in the exercise of its corporate franchise, or, as it is sometimes expressed, upon the franchise "to do," not upon the franchise "to be."

*Union Steam Pump Sales Co.* v. *Secretary of State*, 216 Mich. 261, 272;
*In re: Detroit & Windsor Ferry Co.*, 232 Mich. 574;
*In re: Truscon Steel Co.*, 246 Mich. 174;
*Cobbs & Mitchell* v. *Corporation Tax Appeal Board*, 252 Mich. 478, 481.

Actual transaction of business by a domestic corporation is not a condition of the tax. It is imposed on the right to transact. *In re: G. H. Hammond Co.*, 246 Mich. 179; 2 Comp. Laws, 1929, Sec. 10140.

In all the cases cited or found, where the power to impose a similar tax during receivership has been denied, it has appeared that the corporation was insolvent, or in process of liquidation, or had been pro-

hibited by law or injunction from exercising its franchises, or the proceedings were for dissolution, the receiver was not operating the business, and the life or right of the corporation to do business had ceased.

*Jones* v. *Winthrop Savings Bank,* 66 Me. 242;
*Johnson* v. *Johnson Brothers,* 108 Me. 272, 296 (80 Atl. 741, 750, Ann. Cas. 1913 A, 1303);
*State* v. *Bradford Savings Bank,* 71 Vt. 234 (44 Atl. 349);
*Commonwealth* v. *Lancaster Savings Bank,* 123 Mass. 493;
*Greenfield Savings Bank* v. *Commonwealth,* 211 Mass. 207 (97 N. E. 927);
*Keeney* v. *Dominion Coal Co.* (D. C. (Ohio)), 225 Fed. 625;
*State of Ohio* v. *Harris* (C. C. A.), 229 Fed. 892.

In holding a receiver liable for a tax "for the privilege of operation of the street railway in public ways" in *Collector of Taxes* v. *Railway,* 234 Mass. 336, 342 (125 N. E. 614), the court used language applicable to all the above cases:

> "There are numerous cases which have held that a corporation in the hands of a receiver is not subject to a franchise tax. Those are cases, however, where the corporation has been prohibited by law or by injunction from exercising its franchises and the receiver is not using them, or the corporation is in process of liquidation."

The cases in which the power to tax has been upheld are many, but some of them have aspects which cause them to be more or less distinguishable from that at bar.

In some States the tax is on the franchise of the corporation "to be" and seems to be collectible until legal dissolution or its equivalent. *Kirkpatrick* v. *Board of Assessors,* 57 N. J. Law, 53 (29 Atl. 442);

*In re United States Car Co.*, 60 N. J. Eq. 514 (43 Atl. 673); *Duryea* v. *American Woodworking Machine Co.* (D. C. (N. J.)), 113 Fed. 329; *Conklin* v. *United States Shipbuilding Co.* (D. C. (N. J.)), 148 Fed. 129; *In re Malko Milling & Lighting Co.* (D. C. (Md.)), 32 Fed. (2d) 825; *State* v. *Bradley*, 207 Ala. 677 (93 South. 595, 26 A. L. R. 421).

In some other States statutes provide for the collection of such taxes from a receiver. The courts, however, have not laid decision upon the ground that such special provision created the liability of the receiver for franchise taxes, but have founded liability upon general principles as well. *Bright* v. *State of Arkansas* (C. C. A.), 249 Fed. 950; *Armstrong* v. *Emmerson*, 300 Ill. 54 (132 N. E. 768, 18 A. L. R. 693). In Ohio, where such a statute exists, it has been held, in conformity with the rule elsewhere, that an insolvent corporation which could not exercise its franchise is not subject to the tax when under receivership. *Keeney* v. *Dominion Coal Co., supra; State of Ohio* v. *Harris, supra.* But where the receiver continued the business of the corporation, the tax was sustained. *Morley* v. *Cleveland Hippodrome Co.*, 23 Ohio C. C. (N. S.) 295; *Gerke Brewing Co.* v. *Kuerze*, 7 Ohio App. 37; *Guardian Savings & Trust Co.* v. *Templar Motors Co.*, 116 Ohio St. 95 (155 N. E. 691).

The New York statute, Cahill's Consol. Laws of New York, 1930, Chap. 61, Sec. 209, usually reported in the cases as "Consol. Laws, C. 60," provides a tax on corporations generally, "for the privilege of exercising its franchise in this State in a corporate or organized capacity;" and for railroad companies in substantially the same language (Chap. 61, Sec. 184). See *People* v. *State Tax Comm.*, 189 App. Div. 347 (178 N. Y. Supp. 486). It is held that the tax may be levied during a receivership when the receiver is authorized to carry on the business of the corporation. *Central Trust Co.* v. *Railroad Co.*, 110 N. Y. 250 (18 N. E. 92,

1 L. R. A. 260); *People* v. *State Tax Comm., supra; New York Terminal Co.* v. *Gaus,* 204 N. Y. 512 (98 N. E. 11); *People* v. *Hopkins* (C. C. A.), 18 Fed. (2d) 731; *Providence Engineering Corp.* v. *Downey Shipbuilding Corp.* (D. C. (N. Y.) ), 8 Fed. (2d) 305. See, also, *New York Trust Co.* v. *Island Oil & Transportation Co.* (D. C. (N. Y.) ), 7 Fed. (2d) 416; *Philadelphia & R. R. Co.* v. *Commonwealth,* 104 Pa. 80.

To complete the review of authorities, we are informed by counsel that the Federal district court of the western district of Michigan and the standing master in chancery of the eastern district, in unreported cases, have sustained the Michigan tax under conditions similar to those at bar.

It appears, then, that the courts are unanimous in holding a receiver liable for the franchise or privilege tax where he operates the business of the corporation. May the rule be sustained in principle?

Plaintiffs seek to draw a distinction between public utility corporations with special and public functions and private corporations, but we do not find that the courts have done so, except in *Mather's Sons' Co.'s Case,* 52 N. J. Eq. 607 (30 Atl. 321), where it was pointed out that the receiver of a public utility corporation must pay the tax because it is his duty to preserve the franchise, while the receiver of a private corporation pays only as long as he uses the franchise, and, when the corporation is adjudged insolvent, the obligation ceases; and in master's report in *Providence Engineering Corp.* v. *Downey Shipbuilding Corp., supra,* p. 308, where the distinction was denied. A private corporation obtains its powers from the State, as does a public utility, and if the receiver uses the franchise of the corporation when he carries on the business, there is no basis for the distinction claimed.

Plaintiffs also stress *United States* v. *Whitridge,* 231 U. S. 144 (34 Sup. Ct. 24), in which the court held

that the Federal corporation tax is not assessable while the corporation is under receivership. The decision has been cited in many of the cases upon the instant question and variously distinguished. We have not discovered that it has been held authority by any court for denial of the right to levy a franchise tax on a corporation under receivership, although there is dictum to that effect. *In re Continental Candy Co.* (D. C. (N. Y.) ), 291 Fed. 773; *Bright* v. *State of Arkansas, supra.* In the latter case it was held not controlling of the instant question, as against the weight of authority and uniformity of decision. Fundamentally, in *United States* v. *Whitridge,* the court held that the Federal tax was not upon the corporate franchise or right to do business, but upon the act of doing business by the corporation itself. The opinion demonstrates that the ruling was a special construction of a special law with a special background and purpose and was not founded upon, and did not establish, general principles applicable to other laws.

The cases holding that a trustee in bankruptcy is not liable for the tax are not pertinent. They point out that, unlike a receiver, the trustee takes the whole title to the corporate property, and, in operating the business, he does so as an individual, and does not exercise the corporate franchises. *In re Continental Candy Co., supra; In re Century Silk Mills* (D. C. (N. Y.)), 12 Fed. (2d) 292.

On receivership, the corporation is not divested of its franchises, nor do they lapse. The court merely takes them into its custody for a time. The franchise "to do" passes to control of the court. *Detroit, etc. R. Co.* v. *Campbell,* 140 Mich. 384; *Grand Rapids Trust Co.* v. *Carpenter,* 229 Mich. 491; *United States* v. *Whitridge, supra.*

The receiver is the creature or officer of the court and is not an agent of the corporation. *Face* v. *Hall,*

183 Mich. 22. But when he is authorized to carry on the business of the corporation, his authority does not come wholly or solely from the equity powers or jurisdiction of the court. The grant of corporate powers is a legislative function. The court, out of its own powers, cannot confer them upon an individual. It could not authorize the receiver to conduct a business not within the corporate charter. The power of the court to authorize the receiver to continue the business of the corporation exists only because the court has become the custodian of the corporate franchises. In so authorizing, it merely directs the person who shall exercise powers belonging to the corporation by legislative grant.

"The receiver of a corporation, conducting its business, takes the place of the corporation and its officers for the purpose of performing the necessary corporate duties and functions, and has the same powers for such purposes, while on the other hand, he cannot act in excess of the corporate powers and the court cannot invest him with authority to that extent." 14-A C. J. p. 1005.

So it follows that, in conducting the business under order of court, the receiver is exercising the franchise "to do" of the corporation. Substantially all the above authorities sustaining the tax so hold. See, also, *State* v. *Sessions*, 95 Kan. 272, 278 (147 Pac. 789).

The tax is on the franchise, and, as the franchise is being exercised by the receiver, the tax is valid. This ruling is confined to the case before us and without prejudice to the contentions of counsel as to liability under other circumstances.

The determination of the board is affirmed.

Butzel, C. J., and Wiest, Clark, McDonald, Potter, Sharpe, and North, JJ., concurred.